Reading Anthracite Company *and* Paul Houser

United Mineworkers of America, United Mineworkers of America, District 2, United Mineworkers of America, Local 807 *and* Paul Houser. Cases 4–CA–23722 and 4–CB–7377

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On June 26, 1996, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. Respondents United Mine Workers of America, United Mine Workers of America, District 2, and United Mine Workers of America, Local 807 filed exceptions and supporting briefs. The General Counsel filed cross-exceptions, a brief supporting the cross-exceptions and answering Respondent Unions' exceptions, and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

1. As set forth more fully by the judge, the proceeding arose in the context of a controversy between two locals belonging to the same International. The Locals help to administer a contract between Respondent Employer and Respondent International. The contract covers a unit which includes, inter alia, a facility at Respondent Employer's Maple Hill site in northeastern Pennsylvania. Under the contract, each Local has its own seniority panel. Employees who transfer from one Local to another go to the bottom of the new Local's panel.

For various reasons that need not be recounted here, Local 807 had contended for some time that work performed by Local 7226 members fell within its jurisdiction. Certain events in the fall of 1994 led to an eruption of the simmering dispute: several Local 7226 members were temporarily transferred into Local 807 to complete a rush job; and a new production process was announced that threatened Local 807 work. Fearing layoffs, Local 807 announced to the Employer that it would no longer acquiesce in the assignment of certain jobs to Local 7226 members. Based on its interpretation of a previous conciliation award, Mine Workers District 2, the District that oversaw both Locals 7226 and 807, supported Local 807's position.

While the transferred Local 7226 members were still on the Local 807 rolls, a joint agreement was reached at a meeting of representatives of Locals 7226, 807, and District 2. Local 7226 members would be permanently transferred into Local 807 and their seniority "endtailed," i.e., Local 7226 members were placed on the seniority list below all listed Local 807 members. The seniority dates were described in the agreement as the "dates they received their transfer card[s]" into Local 807.

Following completion of the temporary job that had led to the initial transfers, all former members of Local 7226 resumed their former duties. However, because they had moved to the Local 807 panel, they had substantially less panel seniority than they had previously enjoyed.

We adopt the judge's finding that Local 807 and District 2 violated the Act by assigning seniority dates to former Local 7226 members based on the date that they received their transfer cards into Local 807 and became members of Local 807. It is unlawful to use "membership" considerations, e.g., date of local membership, to determine conditions of employment. Such conduct violates Section 8(b)(2) by discriminatorily encouraging membership in that local.[2]

We further find, in contrast to the reasoning of the judge, that the foregoing finding of discrimination is the appropriate basis for finding that the Respondents also breached their duty of fair representation, in violation of Section 8(b)(1)(A). In order to satisfy the duty of fair representation when taking actions affecting unit employees' employment status, a union must act on the basis of relevant considerations, and not on considerations that are "arbitrary, discriminatory, or in bad faith."[3] We reject the judge's basis for finding a breach of the duty, i.e., that endtailing was arbitrary because "dovetailing was the more logical choice." A union, in exercising the "wide range of reasonableness" accorded it in representing the bargaining unit, need not satisfy the Board that the choices it makes are better or more logical than other possibilities.[4] As explained below, however, the "logic" of the choice that was made here was fatally flawed because it related to nothing other than membership in a particular union local.

Here, position on the seniority list was governed by an irrelevant and discriminatory consideration, i.e., the dates on which the employees became members of Local 807. These dates did not coincide with any change in the employees' job duties, assignments, classifications, or work locations. The employees who were formerly members of Local 7226 did not enter a new bargaining unit, but remained in the same one in which they had accumulated their Local 7226 panel seniority. The only factor differentiating the two groups of employees was that one group had belonged to Local 807 and the other had not. By using this discriminatory basis for determining sen-

[1] We correct the judge's inadvertent reference to District 2 as District 21.

[2] *Teamsters Local 480 (Potter Freight)*, 167 NLRB 920 fn. 1 (1967). Accord *Teamsters Local 42 (Daly, Inc.)*, 281 NLRB 974, 976 (1986), enfd. 825 F.2d 608 (1st Cir. 1987).

[3] *Vaca v. Sipes,* 386 U.S. 171, 190 (1967).

[4] *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

iority, Respondent Unions breached their duty of fair representation in violation of Section 8(b)(1)(A).[5]

The judge's recommended Order requires the parties to establish a new seniority list that dovetails members of Local 7226 with those of Local 807. We cannot conclude that dovetailing the seniority lists is the only lawful method of resolving the conflicting legitimate interests of the employees involved. Accordingly, we will modify the Order to require only that employees' positions on the new seniority list be based upon nondiscriminatory considerations.

2. We agree with the judge that the International is liable for the acts of its subordinates. The International, as the certified representative and a signatory to the collective-bargaining agreement, could delegate the duties of contract administration, but it could not delegate the responsibility.[6] We reject, however, as an additional basis for finding liability, the judge's reasoning that the participation of the International might be necessary in order to fashion an effective remedy.

3. The judge absolved Respondent Employer from all liability for its participation in creating the discriminatory endtailed seniority list. He stated that the Employer had not been shown to have "been motivated by other than legitimate objectives." We reject this analysis and result. The establishment of contractual seniority required the agreement of the Employer and the Union, and the Employer acquiesced in the Union's determination of seniority. The Employer knew that the seniority system was based on date of membership in Local 807**.** When an employer acquiesces in a discriminatory system, it cannot escape liability under the Act merely because the employer did not originate the system or would also have accepted a nondiscriminatory system.[7] Accordingly, we find that the Employer violated Section 8(a)(3).

4. We find merit to the General Counsel's and the Unions' exceptions to the judge's recommended Order that the International disband Local 7226. Such an order would infringe on the right of unions to regulate their internal affairs. Since Local 7226 is an active local that continues to represent employees who do not work at Reading Anthracite, disbandment would also interfere with the right of those employees to be represented by the union of their choice. Moreover, disbandment is not necessary to remedy the unfair labor practice we find here. Accordingly, we do not adopt the judge's recommended disbandment Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. The Respondent, Reading Anthracite Company, Yatesville, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Encouraging membership in Local 807, United Mine Workers of America, or any other labor organization, by maintaining and enforcing agreements with unions that base the seniority standing of employees upon the date that they became members of Local 807.

(b) In any like or related manner interfering with, restraining, or coercing members in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, notify Respondent Unions that a new seniority list must be established based upon nondiscriminatory considerations, and that any employee discriminatorily laid off or otherwise denied employment as a result of the invalid seniority list must be offered full reinstatement.

(b) Jointly and severally with Respondent Unions, make any employee whole for any losses incurred as a result of the discrimination against him in the manner specified in the remedy section of the judge's Order.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at the Maple Hill, Pennsylvania facility of Reading Anthracite Company, copies of the attached notice marked "Appendix A."[8] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these

[5] *Teamsters Local 480 (Potter Freight)*, supra, 167 NLRB at 924; *Teamsters Local 42 (Daly, Inc.)*, supra, 281 NLRB at 976.

[6] *Mine Workers District 17 (Joshua Industries)*, 315 NLRB 1052, 1064 (1994); *United Mine Workers (Garland Coal)*, 258 NLRB 56 (1981).

[7] *Cuneo Eastern Press of Pennsylvania, Inc.,* 168 NLRB 523, 527–528 (1967). See also *Wolf Trap Foundation*, 287 NLRB 1040, 1041-1042 (1988) (an employer will be found liable under Sec. 8(a)(3) for a union's discriminatory hiring hall referrals if the employer has actual knowledge or is reasonably charged with notice of discrimination in referrals which the employer has accepted).

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 14, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on forms provided by the Region attesting to the steps the Respondent has taken to comply.

B. The Respondents, International Union, United Mine Workers of America, United Mine Workers of America, District 2, and United Mine Workers of America, Local 807, their officers, agents, and representatives, shall

1. Cease and desist from

(a) Encouraging membership in Local 807, United Mine Workers of America, or any other labor organization, by maintaining and enforcing agreements with employers that base the seniority standing of employees upon the date that they became members of Local 807.

(b) Causing employers to reduce the seniority of their employees in order to conform to seniority standings based on when such employees became members of Local 807.

(c) Threatening any employee that he could not work for the employer and would be run off the job if he did not voluntarily transfer from Local 7226 to Local 807.

(d) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, notify Reading Anthracite Company that a new seniority list must be established based upon nondiscriminatory considerations, and that any employee discriminatorily laid off or otherwise denied employment as a result of the invalid seniority list must be offered full reinstatement.

(b) Jointly and severally with Respondent Employer, make any employee whole for any losses incurred as a result of the discrimination against them in the manner specified in the remedy section of the judge's Order.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its union offices within the jurisdiction of District 2 and at the Maple Hill, Pennsylvania facility of Employer Reading Anthracite Company, copies of the attached notice marked "Appendix B."[9] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Region, file with the Regional Director sworn certifications of responsible officials on forms provided by the Region attesting to the steps the Respondents have taken to comply.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT encourage membership in Local 807, United Mine Workers of America, or any other labor organization, by maintaining and enforcing agreements with unions that base the seniority standing of employees upon the date they became union members of Local 807.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL notify United Mineworkers of America, United Mineworkers of America, District 2, and United Mine Workers of America, Local 807 that a new seniority list based on nondiscriminatory considerations must be established, and that any employee discriminatorily laid off or otherwise denied employment as a result of the invalid seniority list must be offered full reinstatement.

WE WILL jointly and severally with the Unions, make any employee whole for any losses incurred as a result of the discrimination against them.

READING ANTHRACITE COMPANY

APPENDIX B

NOTICE TO EMPLOYEES AND MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT encourage membership in Local 807, United Mine Workers of America, or any other labor organization, by maintaining and enforcing agreements with employers that base the seniority standing of em-

[9] See fn. 8, supra.

ployees upon the date they became union members of Local 807.

WE WILL NOT cause Employer Reading Anthracite Company to reduce the seniority of its employees in order to conform to seniority standings based on when such employees became members of Local 807.

WE WILL NOT threaten any member that he cannot work for Reading Anthracite Company and will be run off the job if he does not voluntarily transfer to Local 807.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL notify Reading Anthracite Company that a new seniority list based on nondiscriminatory considerations must be established, and that any employee discriminatorily laid off or otherwise denied employment as a result of the invalid seniority list must be offered full reinstatement.

WE WILL, jointly and severally with Reading Anthracite Company, make any employee whole for any losses incurred as a result of the discrimination against them.

UNITED MINEWORKERS OF AMERICA, UNITED MINEWORKERS OF AMERICA, DISTRICT 2, UNITED MINEWORKERS OF AMERICA, LOCAL 807

Carmen P. Cialino Jr., Esq., for the General Counsel.
John Stember, Esq., of Pittsburgh, Pennsylvania, for the Respondent.
Martin V. Cerullo, Esq., of Pottsville, Pennsylvania, for the Respondent Employer.
Gregory L. Hawthorne, Esq., of Washington, D.C., for the Respondent International Union.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This case was heard in Philadelphia, Pennsylvania, on April 8 and 9, 1996. Subsequent to an extension in the filing date, briefs were filed by the General Counsel and the Respondent Unions. The proceeding is based upon an original charge filed December 27, 1994,[1] by Paul Houser, an individual. The Regional Director's consolidated complaint dated September 26, 1995, alleges that Respondent Employer Reading Anthracite Company and Respondent Union United Mineworkers of America, District 2 and Local 807, violated Section 8(a)(3), (1)(b), and (A)(2) of the Act by entailing certain employees based on arbitrary and discriminatory reasons. In addition, the complaint alleged that Respondent Union violated Section 8(b)(1)(A) of the Act by threatening an employee with job loss unless he became a member of Local 807.

Upon a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

[1] All following dates will be in 1994, unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent Employer, a Pennsylvania corporation, has been engaged in the mining and sale of anthracite coal at locations in northeastern Pennsylvania. During the past year, in these operations, the Employer sold and shipped coal valued in excess of $50,000 directly to points located outside the Commonwealth of Pennsylvania. The Employer is engaged in commerce within the meaning of the Act. The International Union, District 2, Local 807 and also Local 7226 are all labor organizations within the meaning of Section 2(5) of the Act and I find that the circumstances meet the Board's jurisdictional standards and it effectuates the policy of the Act to exercise jurisdiction in a case of this nature.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Employer's surface mining operations are supplemented by transportation to a preparation plant where raw material is process to a standard anthracite product. In this operation, the Employer controls over 39,000 acres of land in several counties in northeastern Pennsylvania, including land in Yatesville, Pennsylvania, called the Maple Hill area, where the instant dispute arose.

The employees who perform the work for the Employer are subject to a collective-bargaining agreement between the Employer and the United Mine Workers of America. The most recent agreement became effective May 23, 1994, and is entitled "Reading Anthracite Company Wage Agreement of 1994." At its effective date, the agreement bound the Employer and at least six locals of the mine workers union including Locals 807 and 7226. The contract is between the Employer and the International Union, United Mine Workers of America (UMWA). The UMWA is divided into districts, broken down by geographical area, with District 2 currently operates in eastern Pennsylvania and, under its constitution, the international delegates to Districts the responsibility for implementing and administering all collective-bargaining agreements. Also within each district, there are local unions which form mine committees.

District 2 executive board member, Jay Berger, testified that the District also has responsibility to assure that the agreements are fairly applied and enforced and that he had the authority and responsibility to administer the contract with the Employer in this case. Berger, as district representative, handles grievances at step 3 and beyond to resolution by an impartial umpire (grievances at the initial steps are handled by representatives of the local unions through the mine committees).

The Employer's Maple Hill worksite is divided to the North and South by state route 54 and is dominated by three key buildings. The Old St. Nicholas Breaker, a coal preparation plant, was built in the 1930s and closed in 1961. The breaker was replaced by the Fine Coal plant, located near the old breaker, and which was operated from 1961 until early 1991. A "co-generation" plant was built and completed in 1987. "Waste" material was placed in a "slush dam" or "silt dam" located near the northernmost point of Maple Hill. Derrick testified that there is a market for this slush material in the power generating plants throughout northeastern Pennsylvania, and also that the employer processes and blends the silt with prepared coals and sells the furnished product. In addition, the slush is used by the employer in the wet silt plant where it

processed and sold as a higher grade product. Derrick testified that the slush dam contains over a million tons of slush which is constantly processed and used in this manner.

Ash is a by product of the anthracite produced at the co-generation plant and is currently moved by large trucks and deposited in the "new ash pit" on the northernmost portion of the site near the silt dam. The Company first began dumping ash in the new pit in late 1989, when the co-generation plant began burning anthracite waste. The ash is not being marketed but it is disposed of by layer compacting and reclamation covering by a bulldozer at the site which spreads, compacts, and covers the ash pit.

The work at Maple Hill was historically performed by members of Local 7226 and also by members of Local 807 on separate seniority panels. As shown by seniority lists in existence prior to the consolidation and entailing which led to the instant litigation, the respective locals had workers in the following job classifications.

Local 7226	*Local 7226*
Truck Driver	Truck Driver
Front End Loader	OperatorGreaser
Dozer Operator	Grade Operator
Loader Operator	Engineman
Gradall Operator	Mechanic
Electrician	Shovel Operator
Shaker Attendant	Dozer Operator
Hydrator Operator	Dryer Plant Attendant
Sweeper	Wet Silt Plant Attendant
WelderLoader	Operator

From 1990, when the fine coal plant was closed and the co-generation plant was completed, until the fall of 1994, Local 7226 members perform the following job assignments: maintained the waste water pumps near the Old St. Nicholas Breaker which pumps the slush to the dams; operated bulldozers and other equipment in the new ash pit; excavated the silt out of the silt dam, delivered the silt with a truck to the wet silt plant; and cleaned debris from the Highway 54.

Employee members of Local 807 performed the following jobs during this same period: delivered culm, by truck from the culm bank to the co-generation plant; strip mined the area adjacent to the co-generation plant; maintained rolling stock; and trucked the ash from the co-generation plant to the new ash pit.

Meanwhile, and without the knowledge of the Employer (there was no impact on the assignment of work during this period), in 1987 and 1988, the Union's District formed a commission to deal with a dispute covering the jurisdictional right of the Reading Anthracite slush dam at the Old St. Nick site (the award contained no reference to the new ash pit because it was not erected at the time, and there was no discussion about it). The award, as decided in 1988, found that: that primary jurisdiction to slush dam materials, including hauling of the slush out of the dams, was to be done by Local 7226; that hauling from the co-generation plant to the dam was the work of Local 807; that hauling for maintenance purposes could be done by either Union; and that Local 807 had territorial jurisdiction in the specific area covered by the slush dam, so that if mining were to occur if and when the slush were eventually removed, it would be performed by Local 807.

The decision had no practical effect on the assignment of ash pit work which the employer exclusively gave to Local 7226. In spite of this, Berger stated that the 1988 award gave ash pit and all other work, except slush dam work, to Local 807 but that Local 807 permitted 7226 members to perform ash work because there were no layoffs or fear of layoffs by Local 807 members at that time. Berger claimed that Local 807 then changed its position when the threat of job loss because possible, based on planned operational changes communicated by the Employer to the Union (Schulykill Resources is planning to either build a conveyor to transport ash to the new ash pit; or a slurry to convey it to an abandoned pit). As a result of these plans, some truckdrivers from Local 807 could no longer be needed and would be laid off.

In September 1994, the Employer's decided to assign Local 7226 members to a temporary job south of Route 54 placing cover (required by the Pennsylvania's Department of Environmental Protection) on the old ash pit by the co-generation plant. The State's order created a very tight time schedule and required the Employer to use additional personnel and the Employer decided to utilize 7226 members who then were working at the new ash pit and the slush dam.

When Manager Derrick notified the Union of this decision, the Union demanded that Local 7226 members transfer into Local 807, as the Union claimed that the work was south of Route 54 and thus within the jurisdiction of Local 807. The Local 7226 members assigned were: Ronald Wallace (dozer operator), Joseph Parkansky (loader operator), Joseph Lucas (truckdriver), and James Hudson (dozer operator). Wallace, who had been president of Local 7226, testified that foreman David Kerstetter told him that as soon as the cover work was done, the employees could return to their old work and to their old local. (Derrick confirmed that this was the Company's plan, as there was over a million tons of slush to be processed and work to be performed at the new ash pit). Wallace also testified that immediately prior to the cover job, he had been working 6–7 days per week at the new ash pit but that he signed a card transferring into Local 807 in September 1994 because he was required to do so in order to perform the cover work. He testified that he spoke to Berger about this and that Berger told Wallace to transfer to Local 807 and that he would simply transfer back to Local 7226 once the cover work was completed.

The cover work lasted for approximately 2 months and the employees assigned to the cover work returned to their previous assignments, however, Local 807 officials would not allow them to transfer back to Local 7226. Wallace specifically testified that committeeman, Andy Velousky, told him that there was no way that he and Hudson were getting their cards back, and that this was done pursuant to instructions from Union President Ploxa.

On October 7, 1994, Ploxa wrote to the Employer, enclosed the 1988 Commission award noted above, and claimed work at the new ash pit for Local 807. The Employer responded on October 10 and indicated that they would not change any work assignments, but would continue assigning new ash pit work as he had done since 1990.

On October 12, Berger wrote a letter to Derrick unilaterally reversing the work assignments of the past 5 years and awarded new ash pit work to members of Local 807 while stating that Local 7226 still retained slush dam jurisdiction. Berger's letter indicated that he had "answered the jurisdictional question here between the two Locals" but made no reference in his letter to the prior Commission reports. He also testified that there were

no other jurisdictional disputes between the Locals beyond the one referred to the 1988 award and that he did not convene a separate Commission in 1994 to award ash pit work to 807 but instead, concluded that the prior award dictated that result.

At the time that Berger wrote the October 12 letter, Wallace and the others had transferred into Local 807 to do the cover work as explained above and there were only two members working in Local 7226, William Kacmarcyk (an electrician) and Paul Houser (a Gradall operator).

Berger testified that Kacmarcyk, who was financial secretary of Local 7226 told him that Local 7226 individuals should be endtailed into the Local 807 unit. Kacmarckyk stood to lose nothing by this, as he would be the senior electrician whether he was on the Local 7226 or Local 807 seniority panel. Wallace indicated at trial that he was not permitted to attend any meetings of Local 7226 on this subject because he was told that he was no longer a member of Local 7226.

Berger wrote a letter dated November 11, 1994, describing an agreement of Local 7226 and Local 807 officers that the remaining members of Local 7226 would be placed on the bottom of Local 807's seniority list and that "Local Union 807 has jurisdiction of all of the Reading Anthracite Company property held by Local Union 7226". This was done despite the fact that Local 7226 did not merge into Local 807, and that Local 7226 remains as a labor organization which files appropriate legal documents with Government agencies.

The letter specifically states that:

> 1. Local Union 807 has jurisdiction of all of the Reading Anthracite Company property held by Local Union 7226.
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> 2. The Reading Anthracite Company employees of Local Union 7226 who had already transferred will retain their starting date on the Local Union 807 seniority list on the day Local Union 807 received their transfer card.
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> 3. Local Union 807 will ask for the remaining employees of Local Union 7226 to bring in their transfer cards. Since only two employees are working in Local Union 7226, they will be placed on the Local Union 807 panel according to who has more seniority on the Local Union 7226 panel.
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> 4. Miners on lay-off status, or who are working at another Local Union and are on the Local Union 7226 seniority list, have recall rights to Local Union 7226 seniority list, have recall rights to Local Union 807 since this is now their "mother panel". Recall to Local Union 807 will be followed as per their seniority on the Local Union 7226 panel.

The following chart show the difference in seniority dates in reference to the Local 7226 seniority list as of October 26, 1994:

Name of Employee	***Date of Local 7226 List***	***Endtail Date on (effec.) Merged List***	***Date of local 7226 Transfer Application***	***Date Transferred Into Local 807***	***Date on Kerstetter Handwritten List***
Joseph Lucas	5/14/59	9/15/94	*8/8/94 9/15/94	9/8/94	9/8/94
James Hudson	10/4/72	9/8/94	9/8/94	9/8/94	9/8/94
Ronald Wallace	8/21/68	9/9/94	9/9/94	9/9/94	9/9/94
Joseph Parkasky	4/28/70	9/15/94	9/15/94	9/15/94	9/15/94
Paul Houser	8/30/71	11/14/94	**	**	11/14/94
John Yanchukis	12/16/74	11/14/94	11/14/94	11/14/94	11/14/94
Wm. Kacymarczyk	12/1/76	11/14/94	11/14/94	11/14/94	11/14/94
Joseph Dambroski	1/2/78	11/14/94	***	***	11/14/94
Dom Amato	1/3/78	11/14/94	***	***	11/14/94
Harry Markel	6/20/86	11/14/94	11/14/94	None	11/14/94
Keith Melke	3/6/68	11/14/94	11/14/94	None	11/14/94

* Lucas transferred to Local 807 on 9/8, he transferred back to 7226 and then back to 807 on 9/15.

** Houser refused to complete these transfer cards.

*** These employees were on worker's compensation and have not worked in 10-12 years.

The merged endtail list shows that Lucas is number 32, following 31 employee numbers of 807, of which only the first 10 named have seniority dates starting earlier than 1979 and any "merged" dates for the Local 7226 numbers reflect the date they transferred into 807 with a transfer card, the September dates, or the date of November 14, which was applied to all others.

Charging Party Houser was not assigned to do the temporary cover work but remained in the new ash pit performing work on his usual excavating machine, a Gradall. At about that time, Houser was approached by Velousky the recording secretary of Local 807, who told Houser that he would be required to transfer into Local 807 and that if he did not do so, he could not work for the Employer. Houser told Velousky that he would let Velousky know about his decision. Several weeks later, Velousky repeated his statement and added that it came from Ploxa (the new district representative and former 807 president) who would "run [Houser] off the job" if he did not transfer.

Houser reached Berger (after four or five phone calls), and Berger urged Houser to transfer, indicating that there would be no layoffs. Houser refused to do so, indicating "this isn't right what's going on" but Berger insisted he would not change his mind. Houser also testified that there has been no change in his job duties from that which he performed all along. Houser testified that since 1990, he has operated the Gradall machine on both sides of Route 54, with 75 percent of the time spent in the ash pits. Both Houser and Derrick stated that the men who were assigned to the cover work returned to their old jobs after it was done and essentially performed their old tasks. Wallace indicated that the Employer wanted to assign him to his old work, however, due to the problems which he encountered with his transfer card, he is now assigned throughout the Maple Hill area (as payloader operator and welder). Wallace's old job classifications, which appear on the 7226 list, have been deleted and he is listed only as a dozer operator. In addition, Wallace who had steadily worked the day shift, is now required to rotate shifts due to the endtailing of his seniority.

The Respondent otherwise presents evidence purporting to show that endtailing of the type which happened in his case is

consistent with past practices. These matters will be set forth to the extent necessary in the following discussion.

Lastly, the General Counsel notes that article 17 of the current bargaining contract requires the parties to abide by prior practices and agreements with respect to seniority. The Employer interpreted that provision to require the parties to follow a seniority agreement contained in an agreement from 1964 which has carried forward to the present.

The first section of that agreement provides that where a layoff occurs, employees in each job classification with the lowest date on their seniority panel will be the first laidoff. General Manager Derrick gave the example of truckdriver Yankulis who prior to the merged list had a seniority date of December 12, 1974, but thereafter had a date of November 14, 1994, and became the junior truckdriver on the combined seniority panel. In the event of a layoff, at Maple Hill, Yankulis would be the first to go if he did not have a claim on anyone junior to him on a job he could perform. At that point, Yankulis would be assigned to a multiunit panel, a companywide panel where he would be assigned to his hire date with the company where he might be able to land a job against people with lesser companywide seniority if a recall were in order.

Derrick also noted that based on the contemplated operational changes to the manner in which ash is conveyed to the ash pits, truckdrivers there would be at the highest risk of layoff and had these lists not been combined, the operational changes would not affect them, as the Local 7226 panel would not be impacted. It the lists had been dovetailed, the members of Local 7226 would have retained their earlier dates and would be under less risk if this operational change occurs.

III. DISCUSSION

A. Liability of the International Union

Although the International Union involved is the certified bargaining representative and a signator to the contract with the employer, it contends that as a matter of "agency" law it cannot be a principal and therefore subject to liability for any remedy. The International Union, relys primarily on *Corando Co. v. United Mine Workers*, 268 U.S. 295, 299 (1925), and argues that locals are separate legal entities, that the Union was not "automatically" responsible for the conduct of its locals and that "automatic" affiliation with the Union District and Locals cannot apply in this case because the International lacks any constitutional authority over the acceptance and resolution of grievances and the determination of seniority issues. The General Counsel on the other hand, points out that the Board has rejected similar defenses in both *Mine Workers (Garland Coal Co.)*, 258 NLRB 56 (1981), and *Mine Workers District 17*, 315 NLRB 1052 (1994), citing in particular page 59 of the former case wherein it states:

> Having delegated its contractual and statutory duties to the mine committee and Respondent District, Respondent International created an agency. It cannot now disavow its agents' actions. . . This is particularly true, where, as here, the agents were acting within the scope of their delegated authority. Simply stated, Respondent International delegated its duties under the contract but did not and could not delegate its responsibilities.

Here, as in the *Garland* case, it is not a matter of deeming the International Union "automatically" liable but of finding such liability based upon its actions and its own constitution. Just as the Board is obligated under the National Labor Relations Act to investigate and pursue appropriate charges advanced by any party, the International Union has apparent responsibilities under the International constitution to act in a number of ways (beyond the mere ministerial processing of grievances and seniority determinations) to protect its own integrity and the rights of its members. Moreover, the International Union mischaracterizes this as a grievance/seniority dispute where it appears to be more in the nature of an affiliation/merger issue which would be more particularly within the control of the parent body.

Here, article 3, section 2 of its constitution reads in part:

> The International Union shall have supreme legislative, executive and judicial authority over all members and subordinate branches, and shall be the ultimate tribunal to which all matters of importance to the welfare of the membership and subordinate branches shall be referred for adjustment. The International Executive Board may approve any affiliation or merger with an existing labor organization, presented to it my the Executive Officers, so long as such action preserves the character and integrity of the Union and is in the best interest of the Organization. Any such International Executive Board action shall insure that the democratic rights of UMWA members as heretofore practiced shall be preserved.

Section 3 provides that:

> All Districts and Local Unions must be chartered by, and shall be under the jurisdiction of and subject to the laws of the International Union and rulings of the International Executive Board.

and article 10, provides:

> Section 2.(a) Local Unions shall be composed of ten or more workers, skilled and unskilled, working in or around coal mines, coal washeries, coal processing plants, coke ovens, or in other industries designated and approved by the International Executive Board.
>
> (b) If a Local Union has been than ten (10) dues paying members for a period of more than one year, and the International Executive Board determines that the maintenance of such Local is no longer in the interest of the Organization, the International Executive Board may direct the International Secretary-Treasurer to order said Local disbanded and to order the transfer of the remaining members to an appropriate Local Union.
>
> Section 4. No mine shall be under the jurisdiction of more than one Local Union; neither shall separate Locals be established for coal washers or coke oven employees, unless there is no Local Union having jurisdiction over some adjacent coal mine to which they can belong.

A reading of the plain language of the International constitution and a review of some of the facts placed on the record shows that the matters involved herein concern a de facto consolidation or merger dictated by the District without the approval of the International or a de facto disbandment and transfer of members, again without the necessary participation of the International in its required duties to "insure that the democratic rights" of its members "be preserved." Here, the International apparently has avoided its duties under its own constitution. This act of omission is a factor that relates to the endtail-

ing/seniority issue that has been handled in such a manner that it apparently has failed to preserve the rights of its members under both its own constitution and under the National Labor Relations Act.

Otherwise, I find that the International also should be found to be equally responsible for the acts of its affiliates which precipitated the alleged unfair labor practice allegations under the applicable president of the *Garland* and *District 17* cases supra. Lastly, I also find that the participation of the International technically might be required in order to effectuate the necessary remedy ordered in this matter and, accordingly, I find that the Respondent International Union must be held responsible, along with its affiliates, for the acts hereafter found to be violative of the Act.

B. Endtailing of Local 7226 Members

In the fall of 1994, the Respondent District acted to effectively eliminate the work done by members (or former members) of Local 7226, and to transfer all members of Local 7226 into Local 807. On October 12, it notified the employer that the ash pit work performed by Local 7226 people would henceforth be under the jurisdiction of Local 807. Then, on November 7 and 9 it decided and confirmed that the members of Local 7226 would be transferred to Local 807 and placed on the bottom of the seniority list. The employer was notified and as a result it thereafter prepared a revised seniority list recognizing the endtailing of the (former) Local 7226 employees.

This list based the seniority dates of former Local 7226 members on the dates when they became members of Local 807, either by the individual action in transferring or the action of the Union in setting November 14 as the effective date for all others (see the chart above).

In the *Mine Workers District 17* case, supra the Board said:

> It . . . is settled that a Union violates Section 8(b)(1)(A) and (2) of the Act with an employer, it maintains and enforces a contractual provision, or an oral agreement, contrary to the contract language, which accords seniority preference to employees based on union considerations, including date of membership in the Union. This is because such conduct can cause, or be an attempt to cause, discrimination while unlawfully encouraging membership in the Union.

and it found that the Union violated the Act by refusing to process a grievance of an employee as it based his seniority on the date when he became a union member rather than an on earlier date when he became employed with the Employer.

Here, the placing of the Local 7226 employees on the bottom of the Employer's seniority list following all of the Local 807 employees, with no credit for their time of employment with the Employer at the same Maple Hall jobsite, clearly and adversely affect their layoff, recall and related rights and it is conduct that accords preference to Local 807 employees based on union consideration that can cause or be an attempt to cause discrimination within the meaning of Section 8(b)(2) of the Act, see *Mine Workers District 23 (Peabody Coal),* 293 NLRB 77 (1989).

In the instant case there is no persuasive evidence that any change in job duties necessitated the action of the Union and it is clear that the seniority date is the same as the date of transfer into Local 807.

The Respondent District and Local attempt to establish that they fall within recognized exceptions to the above principles and argues that a union has no duty to dovetail seniority lists, citing *Jones v. TWA*, 495 F.2d 790, 798 (2d Cir. 1974), and that endtailing can be valid so long it was basis on legitimate unit considerations and was not done for a hostile or arbitrary motive, citing *Schick v. NLRB*, 409 F.2d 395 (7th Cir. 1969). They further contend that their treatment of Houser in endtailing him in Local 807 was based on legitimate seniority unit considerations, the contract, and well-established past practice and is within the "wide latitude" which Congress has afforded labor organizations to make decisions within the collective-bargaining process, citing *Airline Pilots v. O'Neill*, 499 U.S. 65 (1991).

The General Counsel, on the other hand also cites the *Jones* case*,* supra*,* and points out that the Court found that the Union violated the duty of fair representation by endtailing employees and determining their seniority on the basis of when they became members of the Union.

The Court found that these individuals were prior members of the *unit* and concluded that as *unit* members, the plaintiffs should have been given seniority under the collective bargaining agreement from the date when they first became passenger relations employees. Instead, they were given seniority on the date when they became union members.

In the instant case, prior to November 1994, all employees in this case were in the same bargaining unit but they were on separate seniority panels. Even if the Union had an objective justification for merging the two seniority panels there was no legitimate basis to equate their seniority date with their union membership date after that. From that point forward, the duties of former Local 7226 members and certain members of Local 807 appear to be indistinguishable and all now work in the silt dams and the ash pits which were once exclusively worked by Local 7226 members. As their duties did not change, and as these duties are substantially identical to those of traditional 807 members, there is no apparent basis for giving them a new and lower seniority date and, as in *Jones*, the only distinguishing characteristic is that prior to the fall of 1994, these individuals were not members of Local 807. As in *Jones*, equating seniority with union membership in a specific local would appear to be arbitrary and unlawful.

Moreover, I am not persuaded that the Unions have shown an objective justification for their actions. Although someone in Local 807 belatedly became concerned over ongoing practices when some Local 7226 employees were assigned to do ash pit cover work on a temporary basis, the decision by the District to merely accept these concerns and to effectuate a "merger" of Locals was not fully investigated or pursued in a manner that permitted an objective review of the concerns of Local 7226 members. In fact, Wallace the nominal president of Local 7226, was told he wasn't permitted to function in that roll as he had transferred to Local 807 for the temporary job assignment and the secretary/treasurer, who was unaffected by any change (as he was the only electrician) was accepted by the District as the only voice for Local 7226 members. Also, there is no showing that dovetailing was ever considered or that true objective consideration recognizing the right of all its members (and specifically, those who were or had formerly been in 7226), were evaluated. Instead, the District acted in a precipitous and arbitrary manner by taking ash pit jurisdiction from Local 7226 inasmuch as the record shows that the prior award did not cover that work. Rather, for 5 years, after the prior jurisdictional award, Local 7226 members performed this work.

Accordingly, to take this work away from Local 7226 members, without convening a separate Commission, would appear to be an arbitrary abuse of union power, as was the Union's decision to eradicate silt dam jurisdiction. As noted, the Union based this decision in November 1994 on its conclusion that only two individuals remained in that Union. However, if the Respondent Union had permitted Local 7226 members to transfer back to their Local to perform ash pit work, as Berger had previously promised Wallace, the numbers would not have been so few.

As otherwise concluded herein, the Union also threatened the Charging Party if he did not accept a transfer to Local 807 and this illegal practice is an action that tends to reinforce the probability that the Respondents' action was lacking in objectiveness.

Under these circumstances I find that no persuasive reasons are shown as to why dovetailing would not have been the more logical choice and I conclude the Union's decision to endtail rather than dovetail appears to be arbitrary. See *Humphrey v. Moore*, 375 U.S. 335 (1964), wherein the Supreme Court stated:

> The Join Conference . . . was entitled . . . to integrate the seniority lists upon some rational basis and its decision to integrate lits upon the basis of length of service of either Company was neither unique nor arbitrary. On the contrary, it is a familiar and frequently equitable solution to the inevitably conflicting interests which arise in the wake of a merger or an absorption.

Accordingly, as in *Teamsters Local 42 (J. W. Daly, Inc.)*, 281 NLRB 974 (1986), enf. 825 F.2d 608 (1st Cir. 1987); *Barton Brands v. NLRB,* 529 F.2d 793 (7th Cir. 1976); on remand 228 NLRB 889 (1977), relied on by the General Counsel, I find that the Respondent Union has endtailed a smaller, less favored group of employees into a larger group without objective justification for doing so and I find that it had violated its duty of fair representation and has violated Section 8(b)(1)(A) and (2) of the Act, as alleged. Otherwise, the General Counsel does appear to pursue the involvement of the Employer and I find that by merely issuing a revised merged endtailed seniority list the Respondent Employer, in this instance, has not been shown to have been motivated by other than legitimate objections, *Barton Brands,* supra, and, inasmuch it has no apparent objection to dovetailing the member's seniority, I find that the complaint in Case 4–CA–23722 should be dismissed.

C. Alleged Threat

The record stands unrebutted that Local 807 recording secretary, Velousky, threatened Houser that if he did not transfer to Local 807 he would lose his job with the employer and I find that the General Counsel has shown that this threat violates Section 8(b)(1)(A) of the Act, as alleged. *Operating Engineers Local 132,* 266 NLRB 977, 981 (1983).

CONCLUSIONS OF LAW

1. Reading Anthracite Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondents, International Union, United Mine Workers of America; United Mine Workers of America; District 21; and United Mine Workers of America, Local 807 are labor organizations within the meaning of Section 2(5) of the Act and each entity is a proper party in this proceeding.

3. By adopting and conveying to the Employer (under contract in a collective-bargaining agreement) a decision to give Local Union 807 all the jurisdiction held by Local Union 7226 and to base seniority of the latter members upon the date of transfer to and membership in Local 807 the respective Respondents have violated Section 8(b)(1)(A) and (2) of the Act.

4. By threatening a member that he could not work for the employer and would be run off the job if he did not voluntarily transfer from Local 7226 to Local 807, the Respondents have violated Section 8(b)(1)(A) of the Act.

5. The complaint in Case 4–CA–23722 is not proven and should be dismissed.

6. The above unfair labor practices are unfair labor practices affecting commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondents have engaged in unfair labor practices, I shall recommend that they cease and desist therefrom. In order to effectuate the purposes of the Act, I shall also recommend that Respondents take certain affirmative action. Inasmuch as Local Union 7226 no longer appears to be a viable entity and as job classifications on the worksite involved have been effectively merged, the Respondents will be required to immediately rescind their decision to "endtail" employees from Local 7226 and to request the Employer to establish a new seniority list that reflects employee seniority dates (and job classifications), with the Employer based upon their dates of employment as former members of Local 7226 and "dovetail" their seniority in a manner consistent with the Supreme Court's decision in *Humphrey v. Moore*, 375 U.S. 335 (1964).

Should it appear that any former member of Local 7226 has been laid off or otherwise denied employment because of his discriminator placement in the "endtailed" seniority list, the Respondents, jointly and severally shall make whole any such employee for any loss of earnings he may have suffered because of the discrimination practiced against him by payment to him of a sum of money equal to that which he normally would have earned in accordance with the method set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1183 (1987),[2] and shall notify the Employer that such employee should be reinstated.

Otherwise, it is not considered to be necessary that a broad order be issued.

[Recommended Order omitted from publication.]

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[2] Under *New Horizons*, interest is computed at the Short-term Federal rate for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).